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No. 06-1632

IN THE

Supreme Court of the United States

JTEKT CORPORATION (F/K/A/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A., NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

In opposing the Petition, both the Solicitor General ("SG") and intervenor Timken US Corporation ("Timken") entirely miss the point. The United States has announced that it will implement the WTO's January 9, 2007 decision that the practice of "zeroing" violates the United States' treaty obligations in *this* administrative review. See Pet. at 10 (citing Pet. App. 58a-60a); Gov't of Japan *Amicus* Br. at 2-3, 6-7. Had this case been brought in the D.C. Circuit, the court of appeals would have remanded to the Department of Commerce to allow that agency to discharge its responsibility to determine how to implement the WTO's decision. See *Panhandle E. Pipe Line Co.* v. *FERC*, 890 F.2d 435, 438-39 (D.C. Cir. 1989). This longstanding rule preserves agency authority and avoids judicial encroachment on an exclusive function of the Executive Branch. The Federal Circuit's refusal to order a remand in this case creates an unnecessary conflict in the law governing federal agencies.

A remand is critical here, because without it, there is simply no way for Commerce to determine how to implement the WTO's holding that the United States violated its treaty obligations when it zeroed petitioners' negative dumping margins: once petitioners' entries are liquidated, there is no mechanism by which the Executive Branch may reconsider its disposition of an administrative proceeding and "reliquidate" the entries. Thus, the failure to remand will prevent the Executive Branch from fulfilling its promise to the WTO and Japan that it will implement the WTO decision by December 24, 2007. Pet. App. 58a-60a. The SG and Timken never explain how Commerce can fulfill this diplomatic assurance if the very administrative review as to which the United States announced its intent to implement the WTO ruling is allowed to pass forever beyond the reach of the agency. These results would not have occurred in the D.C. Circuit, and a writ of

certiorari is warranted to correct the Federal Circuit's error and eliminate the conflict.

Rather than grapple with this fundamental point, the SG and Timken attempt to confuse matters. Both argue that the statute only allows "prospective" implementation of WTO decisions. See SG Opp. at 17-18; Timken Opp. at 19-22 (citing Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-495, § 129(c), 108 Stat. 4809, 4836 (codified at 19 U.S.C. § 3538(c))). This assertion, however, flatly contradicts assurances the United States has made to its treaty partners that Commerce *can* implement WTO decisions in existing administrative proceedings like this one, without reference to Section 129(c). See Pet. at 17; Pet. App. 66a-67a. Indeed, the WTO relied on this express assurance in dismissing a challenge to Section 129(c) brought by the Government of Canada, which contended that prospective-only implementation (the same interpretation the SG and Timken advance here) would violate the plain requirements of the Anti-Dumping Agreement. See Pet. at 17.

The SG and Timken also elide the fact that the United States has assured both the WTO and Japan that it will implement the WTO's decision that zeroing was improperly applied in this administrative review. See Pet. at 10 (citing Pet. App. 58a-60a); Gov't of Japan *Amicus* Br. at 2-3, 6-7. The opponents apparently argue that because Commerce chose not to implement *other* WTO decisions retrospectively (in cases that were *not* the subject of the WTO's decision at issue here), the federal courts should simply assume that Commerce will follow the same course here. But this assumption is not for the courts to make, as the D.C. Circuit expressly recognizes.

The SG and Timken are, of course, entitled to make all their arguments if and when this Court hears this case on the merits. But they are misplaced in opposition to the Petition. The Federal Circuit has opened a clear and unnecessary conflict in the law governing federal agencies, and in doing so

has interfered with Commerce's ability to discharge the United States' international obligations. A writ of certiorari should be granted.

I. THE INTERPRETATION OF SECTION 129(c) ADVANCED BY THE SG AND TIMKEN CONTRADICTS THE INTERPRETATION ADVANCED BY THE UNITED STATES TO ITS TREATY PARTNERS.

1. The SG and Timken argue that the Federal Circuit need not have remanded this case to Commerce because Section 129(c) of the URAA limits implementation of WTO decisions to entries that occur after the implementation decision is reached. The SG and Timken interpret this provision to mean that Commerce cannot implement the WTO's decision in this case, see SG Opp. at 17-18; Timken Opp. at 19-22, despite the fact the WTO's decision was directed expressly to this case and the United States has assured its treaty partners that it will fully implement the WTO's ruling.

The USTR and Commerce are statutorily charged with implementing the URAA. See 19 U.S.C. §§ 3533(g), 3538. And those agencies, in defending the validity of Section 129(c), have assured the WTO that the section does *not* limit Commerce's authority to implement the WTO's decisions as to entries that predate the change in policy. In fact, in providing that assurance, the United States relied expressly on the possibility of a judicial remand where, as here, a WTO decision results in a change to U.S. policy:

> In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.
>
> ... The only impact of section 129(c)(1) ... is that Commerce would not determine the fate of those pre-implementation entries in the revocation determination itself. Section 129(c)(1) does not require Commerce to apply duties to those entries, it does not limit

> Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.

Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶¶ 19-20, WT/DS221 (Mar. 8, 2002), Pet. App. 66a-67a (emphasis and footnote omitted). Thus, according to the United State's own submission, if a judicial proceeding "results" in a remand to allow the agency to reconsider its disposition of entries because it has decided to implement a WTO ruling, Section 129 poses no obstacle to such reconsideration.

Based largely on this assurance, the WTO ruled that the United States was not in violation of its treaty obligations. See Panel Report, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶¶ 6.82-6.83, WT/DS221/R (July 15, 2002).[1] This interpretation continues to animate the United States' interpretation of the statute in its statements to the WTO, inasmuch as it has informed the WTO that it will implement the WTO's decision in this case, notwithstanding the fact that this administrative review predates the implementation decision. See Gov't of Japan *Amicus* Br. at 2-3, 6-7.

The interpretation of Section 129(c) advanced by the responsible agencies in defending its validity before the WTO, and in conducting the foreign relations of the United

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[1] The SG attempts to rewrite history in claiming that petitioners "misconstrue the United States' WTO representations." *See* SG Opp. at 18-19. The SG's carefully chosen citations from the submission—which stand for the unremarkable proposition that Commerce may apply a WTO decision to future administrative reviews—conveniently omit the section quoted above, which directly refuted Canada's arguments.

States in this case, is entitled to deference. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The SG's and Timken's contrary (and belated) litigation position is not.

2. The SG, apparently realizing that its absolutist reading of Section 129(c) is incorrect, also argues that "to the extent that *the Executive possesses discretion to grant retrospective relief*, it has no obligation to do so." SG Opp. at 20 (emphasis added). This is true, but irrelevant. As explained below, petitioners are not claiming that they could compel the Executive to implement the WTO's ruling, or force it to implement that ruling in any particular way. Petitioners' argument, rather, is that, under the D.C. Circuit's remand rule, the Executive would have been afforded the opportunity to decide whether to implement and, now that it has announced it will do so, to decide how to implement. The Federal Circuit's failure to remand will prevent the Executive from discharging its treaty obligations and stated intent to its treaty partners.

3. Finally, the SG and Timken appear to argue that a remand would be futile because Commerce might adopt their interpretation in this case—*i.e.*, that Section 129(c) prevents retrospective implementation to the administrative review at issue here, despite the United States' assurances to the contrary. But this type of uncertainty is precisely why the D.C. Circuit remands cases to the agency. If Commerce decides to interpret Section 129(c) to deny petitioners the relief it has already promised, petitioners can challenge that interpretation on direct appeal (and, undoubtedly, the Nation's treaty partners will also challenge it before the WTO). But this is plainly not a reason to deny a remand in the first place.

II. THE UNITED STATES HAS ASSURED ITS TREATY PARTNERS THAT IT WILL IMPLEMENT THE WTO'S DECISION IN THIS CASE.

The SG and Timken also argue that there was no need for the Federal Circuit to have followed the D.C. Circuit's remand rule because Commerce has not yet announced how it will implement the WTO's decision in this case. SG Opp. at 17; Timken Opp. at 25-27. The logic of this argument is inverted—the fact that Commerce has not decided how to implement is *exactly* why the Federal Circuit should have followed the D.C. Circuit's rule and remanded to the agency.

1. The United States has announced that it will implement the WTO's decision, which applies to this administrative review. See Pet. at 10, 17-18; Pet. App. 58a-60a; Gov't of Japan *Amicus* Br. at 2-3, 6-7. Commerce has discretion to decide how to accomplish this, and the existence of such discretion is precisely why the D.C. Circuit remands cases to agencies for further consideration: federal courts should not presume to predict how an agency will implement an announced change in policy in a particular case, and thus it is necessary to remand those cases for further proceedings. See, *e.g.*, *NLRB* v. *Food Store Employees Union*, 417 U.S. 1, 10 n.10 (1974); *Panhandle*, 890 F.2d at 438-39 ("because we are at liberty neither to evaluate the Commission's decision under FERC's *old* policy[,] nor to assess on our own how Panhandle's tariffs would fare under FERC's *new* policy, we are required to remand so that the Commission may indicate how, if at all, its decision would be affected by its intervening policy change"). Timken and the SG simply have it backwards.

2. Timken and the SG also make the curious argument that "Commerce [has only] adopted a change in investigations, [and has] expressly declined invitations to apply the change to other types of determinations, such as annual reviews." Timken Opp. at 16-17, 23; see also SG Opp. at 15-17. But they rely on the United States' implementation of a different

WTO decision—*i.e.*, its 2006 decision that zeroing violates the United States' treaty commitments when used in antidumping investigations. See SG Opp. at 15-16, 18; Timken Opp. at 23-24 (citing *Antidumping Proceedings*, 71 Fed. Reg. 77,722, 77,724 (Dec. 27, 2006)). In announcing its change of policy pursuant to that decision, Commerce explained that because the WTO's decision was limited to investigations, the change in policy was likewise limited to investigations. 71 Fed. Reg. at 77,724. The SG also relies on a later decision by Commerce not to extend the WTO's 2006 decision to a particular administrative review involving imports of Dutch steel, as to which the underlying antidumping order had been revoked pursuant to the WTO's 2006 decision. SG Opp. at 16. Again, Commerce's decision in the Dutch steel administrative review is irrelevant because, unlike here, it did not purport to implement a WTO decision related to the specific administrative review at issue, and the United States had not expressly stated its intent to implement a WTO decision governing that very review. The SG and Timken ignore these critical distinctions.[2]

The SG and Timken thus misrepresent petitioners' argument: petitioners are not claiming, and have never claimed, that this case should have been remanded because Commerce's decisions regarding investigations should also apply to administrative reviews.[3] Rather, the United States

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[2] Timken also points out that the United States has expressed some opposition to the WTO's decision in this case and has proposed that, in the future, zeroing should be allowed under the Anti-Dumping Agreement. *See* Timken Opp. at 14. Petitioners do not fathom the relevance of this argument. The United States may propose to its treaty partners that they consider changing the rule in the future, but this does not change the fact that the United States has committed to fully implement the WTO's decision in this case.

[3] The SG mischaracterizes petitioners' argument that a remand was necessary to allow Commerce to decide whether to implement the WTO's decision regarding this administrative review, based on its decision to implement the WTO's earlier ruling regarding investigations. *See* SG

itself announced that it would change the policy governing the administrative review involved here, but its ability to implement that change is stymied by the Federal Circuit's failure to follow the D.C. Circuit's remand rule. The *only* way the Executive Branch can discharge its assurances to treaty partners in this case is if the federal courts relinquish their jurisdiction and remand to Commerce. The Federal Circuit's refusal to do so is at odds with the D.C. Circuit's rule and interferes with the Executive Branch's ability to conduct the foreign affairs of the United States. Each is a sufficient reason to grant a writ of certiorari.

III. THE SG'S ARGUMENT THAT THERE IS NO PRIVATE CAUSE OF ACTION TO ENFORCE A WTO DECISION IS INAPPOSITE.

The SG argues that petitioners are attempting to enforce the WTO's decision directly, and no private cause of action exists for them to do so. *Id.* at 11-14. This argument is mistaken. Petitioners asked the Federal Circuit to remand to the agency (as the D.C. Circuit routinely does) in light of the need for Commerce to consider whether and how to implement an intervening WTO decision covering this very case, which the USTR later announced it would implement. As the Petition makes clear, the Federal Circuit's decision not to remand has rendered impossible the process by which Commerce would decide upon the proper implementation of the WTO decision.

Opp. at 16-17 (quoting Pet. at 17). Petitioners do not argue that Commerce should apply its December 27, 2006 discontinuation of zeroing to administrative reviews; rather, petitioners argue that the WTO's intervening decision in January 2007 (which the SG ignores) that zeroing also violated the Anti-Dumping Agreement when used in this administrative review should result in a remand for Commerce to decide how to implement *that* decision. Petitioners referred to Commerce's 2006 decision regarding investigations only to show that Commerce was likely to implement in the current case as well—which, shortly thereafter (in February 2007), the United States announced it would do.

Remanding to the agency to consider how to implement the change in policy does not usurp Commerce's statutory authority, nor does it compel Commerce to make any particular decision. It certainly bears no resemblance to a "private cause of action" under the Anti-Dumping Agreement. Instead, it *preserves* the agency's authority, which is the entire basis for the D.C. Circuit's remand rule. See, *e.g.*, *Panhandle*, 890 F.2d at 438-39 ("we are required to remand so that the Commission may indicate how, if at all, its decision would be affected by its intervening policy change").[4]

IV. TIMKEN'S ARGUMENT THAT THE FEDERAL CIRCUIT SHOULD NOT HAVE "INTERJECTED" ITSELF IN THE EXECUTIVE BRANCH'S PROCESS SUPPORTS PETITIONERS.

Timken argues that consideration of how to implement a WTO decision is committed exclusively to the Executive Branch, and the Federal Circuit should not have "interjected" itself in the process. Timken Opp. at 27-29. Petitioners could not agree more. But this does not support the SG's and Timken's position. To the contrary, the Federal Circuit "interjected" itself in the Executive Branch's implementation process when it refused to remand this case to the agency.

Despite the SG's and Timken's attempts to deflect the issue, the Court should be under no illusions about the effect of denying certiorari in this case. Unless the Federal Circuit's unreasoned decision not to remand this case is reviewed and reversed, the dumping determination in this administrative review will stand and Commerce will be permanently prevented from fulfilling the United States' announced intent

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[4] The Court of International Trade has repeatedly rejected the argument the SG makes here. *See, e.g.*, *Tembec, Inc.* v. *United States*, 441 F. Supp. 2d 1302, 1318-20 (Ct. Int'l Trade 2006) (per curiam); *Timken Co.* v. *United States*, 240 F. Supp. 2d 1228, 1238 (Ct. Int'l Trade 2002), *aff'd*, 354 F.3d 1334 (Fed. Cir. 2004).

to implement the WTO's decision in this case. Perhaps, as the SG and Timken predict, Commerce will decide that only prospective implementation is necessary, a decision the Nation's treaty partners could challenge before the WTO. But the ultimate outcome of Commerce's process is irrelevant to whether the Federal Circuit should have followed the D.C. Circuit's rule and remanded to the agency to allow it to make the decision in the first instance. *This* is the issue that warrants a writ of certiorari. The Federal Circuit's failure to follow the prevailing rule interferes with Commerce's review process and prevents it from fulfilling the United States' treaty obligations and its assurances to its treaty partners that it will implement the WTO's decision in this administrative review. Application of the D.C. Circuit's remand rule would avoid these untoward results.

A writ of certiorari is warranted to correct the Federal Circuit's error.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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